

In the High Court of Judicature at Madras

Dated:06.03.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.757 OF 1997

Mohanasamy Mudali ..Appellant (Defendant)

v

Maninatha Mudali ..Respondent (Plaintiff)

This second appeal is filed against the judgment and decree dated 30.08.1996 made in A.S.No.102 of 1995 on the file of the Court of Subordinate Judge, Kancheepuram reversing the decree and Judgment in O.S.No.225 of 1985 dated 30.01.1995 on the file of the Court of District Munsif, Thiruthani, Chengai MGR District.

For Appellant : Mr.S.Senthilnathan
For Respondent : Mr.D.S.Ramesh

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.102 of 1995 on the file of the Court of Subordinate Judge, Kancheepuram. The defendant in O.S.No.225 of 1985 who has succeeded his defence before the trial Court, but lost in the appeal preferred by the plaintiff in A.S.No.102 of 1995 is the appellant herein.

2. The averments in the plaint in brief relevant for the purpose of deciding this appeal are as follows:

The suit is for declaration of plaintiff's right and title in respect of plaint "B" schedule property which measures 6' east to west 153' north to south in Kalampakkam Village. "B"schedule property is the part of plaint "A"schedule property which measures east to west 29' and north to south 153'. The plaintiff has also asked for the relief of delivery of vacant possession in respect of "C"schedule property which measures 6' east to west and 58' north to south in plaint "B"schedule property and also for permanent injunction in respect of "D" schedule property which is the remaining part of "C"schedule property in "B"schedule property. Plaint "A"schedule property measuring 14 $\frac{3}{4}$ ' east to west and 153' north to south was owned and possessed by three sharers viz., Velayudha, Vaidhyalinga and

Pachaiyappa . The plaintiff's grand father Shri Kanjamalai Mudaliar had purchased plaint "A" schedule property on 25.7.1900 from Veerasami Mudaliar and Rathna Mudali, the sons of Pachaiyappa in respect of their 1/3rd share of their property on the east. Kanjamalai Mudali purchased the 1/3rd share of Vaidhyalinga from his sons, Ayyaswami Mudaliar, Sabapathi Mudali two parts on two occasions. On 30.12.1905, he purchased the eastern part 7 ½ 'east to west and 153' north to south from Ayyaswami and Sabapathi for valid consideration of Rs.17.50 and was in possession and enjoyment of the said property from the date of the said sale dated 11.9.1907. Kanjamalai and his descendants presently the plaintiff were in possession and enjoyment of the plaint "A"schedule property and from the date of purchase of "A"schedule property, the plaintiff and predecessors-in-title were in possession and enjoyment of the "A"schedule property . They have also prescribed right and title by way of adverse possession also. At the time of execution of the said sale deed , the northern boundary of the "A"schedule property was main street. The plaintiff has constructed a house marked as 'ABCD' in the rough plan on the 1/3rd share purchased from Veerasami and Rathina Mudali and a portion in the said property purchased from Sabapathi Mudaliar. It measures east to west 23' and north to south 48'. The open space behind and the space measuring about 6 ' east to west shown as 'GAJE' in the rough plan which is "B"schedule property to the plaint schedule property. On the west of the plaintiff's property, the plaintiff's house was left vacant by the plaintiff for the purpose of storing agricultural products and also for stay of cattle and also for ingress and egress from the street on the northern side. Some five or six years ago, the plaintiff was away from the village and when he was admitted in the hospital for 2 or 3 months, the defendant encroached into a portion of "B"schedule property shown as 'GAHJ' in the rough sketch fully described in the "C"schedule property and put up superstructure. The defendant also interfered with the plaintiff's peaceful possession and enjoyment of the another portion of "B:schedule property which "D'schedule property to the plaint schedule. The plaintiff has issued a suit notice on 23.5.1985. The defendant has sent a reply containing untenable contentions. Hence the suit .

3. The defendant in his written statement would contend that some 40 years ago, the plaintiff's father constructed a house marked as "ABCD" in the plaint rough plan measuring 22 ½' and not 23 ' east to west and about 48' north to south from Nadu Street and the vacant site shown as 'CDJEF' in the plaint rough plan. The plaintiff is not entitled to the land shown as 'AGHIEJD' in the rough plan. The plaintiff's father or his predecessors-in-title never enjoyed it. Hence the question of their perfecting right and title to it by adverse possession does not arise at all. The defendant's grand father purchased the vacant house site west of the plaintiff's house and vacant site shown as 'ADJE' measuring east to west 22 ½' and north to south 157' from one Anna Pachaiyappa Mudaliar for Rs.45/- on 2.6.1919. The defendant's father was using the above said vacant site west of 'ADJE' shown in the plaint rough plan, by putting up cattle shed and hayrick. In the family partition on or about 1972, the defendant got the aforesaid vacant site covered under the aforesaid sale

deed dated 2.6.1919 towards his share and thereafter when the cattle shed fell down, the defendant constructed a terraced house in the year 1976 and in that house, the defendant has put up separate eastern wall abutting the western wall of the plaintiff's house between the points 'AD' shown in the plaint rough plan. The plaintiff's said western wall was constructed only to the length of about 48' but the defendant constructed his house on the west of eastern wall to a length of more than 62' ie., beyond 48' north of the of the plaintiff's western wall in 1976 itself. The plaintiff did not raise any objection at that time because he has no right over the site west of his house vacant site 'ADJE' shown in the rough plan. Now the plaintiff is raising objection falsely claiming title to the vacant space shown as 'AGHIEJD' . The defendant has already constructed his aforesaid house as early as 1976 itself. So the plaintiff is now estopped from claiming the said vacant site. The defendant and his predecessors-in-title have perfected their right and interest to the house site shown as 'AGHIEJD' in the plaint rough plan by adverse possession as they have been in exclusive continuous and uninterrupted possession and enjoyment of it openly to the knowledge of the plaintiff and his predecessors-in-title for more than 12 years. There was no pathway or passage of 6' east to west as falsely shown as 'GAIE' in the rough plan. The averment in the plaint that when the plaintiff has admitted in the hospital for about 5 or 6 years ago, the defendant encroached into a part of the plaint "B" schedule property shown as "C" schedule in the plaint and put up structure and that he attempted to interfere with the plaintiff's possession of the plaint 'D' schedule property are all false and all are invented for the purpose of filing this suit. A portion shown as 'AGHIEJD' in the rough plan absolutely belongs to the defendant. The defendant has not encroached into plaint "C" schedule property. For the notice dated 23.3.1985, the defendant has sent a reply dated 2.4.1985. The plaintiff has no right over the portion shown as ' AGHIEJD' in the rough plan. Hence the suit is liable to be dismissed.

4. On the above pleadings, the learned trial Judge has framed seven issues for trial. The plaintiff has examined himself as P.W.1 besides examining one Elumalai as P.W.2. On the side of the plaintiff, Exs A1 to A6 were marked. The defendant has examined himself as D.W.1 besides D.W2 and D.W.3 were examined. Exs B1 to B3 were marked. A Commissioner was appointed for noting the physical features of the suit property and filed his report Ex C1 and plan Ex C2.

5. After going through the available evidence both oral and documentary, the learned trial Judge has come to a conclusion that the plaintiff is not entitled to the relief asked for in the suit and accordingly dismissed the suit. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred an appeal in A.S.No.102 of 1995 on the file of the Court of Subordinate Judge, Kancheepuram. The learned first appellate Judge after scanning the evidence and also after due deliberation on the submissions made by the appellant as well as the respondent has allowed the appeal thereby granting the relief asked for by

the plaintiff in the plaint except the relief of recovery of possession in respect of plaint "C" schedule property. Instead the learned first appellate Judge has directed the defendant to pay a sum of Rs.1740/- being the value of the property trespassed by the defendant in the plaint "C" schedule property. Hence the second appeal has been preferred by the defendant.

6. The substantial questions of law involved in this appeal are

" 1. Whether the first appellate Court erred in law in computing the period of adverse possession from the date of construction of buildings in "C" schedule instead of computing from the date of possession as pleaded by the appellant?

2. Whether the first appellate Court erred in law in not giving a finding as to who was in possession of the vacant land of "C" schedule property prior to construction?

7. Heard Mr.S.Senthilnathan, learned counsel appearing for the appellant and Mr.S.Ramesh learned counsel appearing for the respondent and considered their respective submissions.

8.The Points:

According to the defendant, he got the property which is situate immediately west of the plaintiff's property under a partition in the year 1972 and that from the date onwards, he is in possession and enjoyment of his land inclusive of plaint "C" schedule property by way of putting up a cattle shed and hayrick in the suit property. It is the definite case of the defendant that he had put up his house in the plaint "C" schedule property in the year 1976. In Ex C1 Commissioner's report also, the Commissioner has observed that the defendant's house is situate just adjoining to the plaintiff's house. In Ex C2 plan the Commissioner has given east west measurement for the plaintiff's house on the southern side as 22 ' 10" and the defendant's terraced house has been shown adjoining to the plaintiff's house on the west with east west measurements shown as 16'5" on the north. Admittedly, the defendant has put up his construction only in the year 1976. The suit was filed by the plaintiff in the year 1985 itself. Under such circumstances, it is not open to the defendant to claim that he has prescribed title to plaint "C" schedule property by way of adverse possession because even the statutory period, the plaintiff has filed the suit. Only if the defendant proves that he is in possession and enjoyment from 1972, he can claim adverse possession. To show that the defendant is in possession of the plaint "C" schedule property from 1972 continuously, the defendant has not filed any tax receipts, except Ex B2 dated 10.8.1989. So as rightly held by the first appellate Court, the defendant is not entitled to claim right in respect of plaint "C" schedule property by way of adverse possession.

9. The learned counsel appearing for the appellant relying on Ex B3 a partition deed entered into between the plaintiff and his brothers on

20.9.1961 and contended that the plaintiff was given only land measuring 22' east west and 160' north south in the plaint "A" schedule property and further the boundaries to the property allotted to the plaintiff in Ex B3 will clearly go to show that immediately west of the plaintiff's property, lies the property of the defendant and that he would contend that there is no 6' pathway in between the plaintiff's property and the defendant's property. But this defence is not available to the defendant because in his written statement itself, the defendant would admit the pathway with width of 6' and claims to have acquired title to the said portion by way of adverse possession. Even though, in Ex B3, the western boundary for the property allotted to the plaintiff was shown as the property of the defendant as per lay, there is 6' pathway was in existence between plaintiff's property and defendant's property cannot be denied or disputed. It is the admitted case of the defendant that he had put up a construction including the 6' width pathway which has been scheduled as plaint "C" schedule property in the year 1976 itself. Even the plaintiff's documents Exs A2, A3, and A6, the east west measurements for the property purchased under those documents by the predecessors-in-title of the plaintiff will go to show that the property having east west measurement of 29' was purchased under those documents because under Ex A2 the property purchased is having 14 ½' as east west measurement and the property purchased under Ex A3 is having a measurement of 7' east west and the property purchased under EX A6 is having measurement of east west 7 ½'. So the total measurements for the property purchased on the south by the plaintiff predecessors-in-title will have a east west measurement of 29'. Following the principles of law of acquisition, the learned first appellate Judge has correctly held that having allowed the defendant to construct his building over the plaintiff's 6' width pathway which has been scheduled as plaint to "C" schedule property, the plaintiff cannot ask for recovery of possession but the remedy open to him is to claim compensation.

10. Even though the learned counsel appearing for the respondent would contend that the compensation fixed by the learned first appellate Judge is inadequate. He cannot agitate the same before this Court without any cross objection. The learned first appellate Judge has fixed the compensation only on the basis of the Court fee paid by the plaintiff on the basis of the market value. So only on the basis of the market value stated by the plaintiff in the plaint, the learned first appellate Judge has fixed the compensation which cannot said to be inadequate that too without any cross objection.

11. Under such circumstances, I do not find any reason to interfere with the well considered findings of the first appellate Judge in A.S.No.102 of 1996 on the file of the Court of the Subordinate Judge, Kancheepuram which is neither infirm nor illegal to warrant any interference from this Court. Points are answered accordingly.

12. In fine, the appeal is dismissed , confirming the decree and Judgment of the first appellate Court in A.S.No.102 of 1995 on the file of the Court of Subordinate Judge, Kancheepuram, with costs through out.

sg

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Kancheepuram
 2. The District Munsif, Tiruttani
 3. The Section Officer, V.R.Section, High Court, Madras.
- +1 cc to Mr.S.Senthil Nathan, Advocate Sr.No.13929.
+1 cc to Mr.D.S.Ramesh, Advocate Sr.No.14322.

SR(CO)
dcp/17.4.07



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